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The Concept of the Successive CMR Carrier on Trial

Simone Lamont-Black*

1. Introduction

The regime for successive carriers in the CMR¹ has attracted attention over the years with recent decision by the UK and Dutch Supreme Courts both courts reached opposing views as to the criteria for a transport being performed by successive carriers. In basic terms where several carriers carry under the same contract they are each liable for the performance of the whole carriage and might be directly exposed to claims by cargo interests and are subject to a special recourse mechanism between carriers with special rules of jurisdiction and additional times frames for limitation purposes. The topic's importance may be due to the manner in which road haulage business is conducted with its ever increasing chain of sub-contracts in the performance of the goods' carriage, particularly when seen in conjunction with the consequences of the strict rules on time bars or jurisdiction under the CMR in general.

Is this system, as it applies now, still appropriate or outdated? Has it been eroded or broadened beyond recognition by case-law? Are jurisdictions in consensus when applying the system to mere sub-contractors and is this appropriate at all? Has it become a lottery which countries' hauliers are involved and thus which successive carrier regime, a broad or a narrow one will apply? Is the successive carrier system needed or justified by the likelihood of bankruptcy of the road haulier and the wish to provide the cargo claimant with a defendant to cover the loss or damage of the goods? All in all, is it time to amend, limit or formally extend this concept to create a level playing field?

The paper's originality lies in the detailed examination of the successive carrier concept, showcasing the mischief created by its diverse interpretation of in different jurisdictions and the resulting scope for abuse. A stance is taken, advocating a narrow interpretation in the absence of amendment of the CMR allowing for the abolition of the concept. Action in this regard is necessary and significant to redress the balance, which currently is inappropriately weighted to the detriment of the performing carrier.

This paper will firstly introduce the concept of the successive carrier as set out in the CMR, its interpretation in the English courts with comparative glances to other jurisdictions and in particular to Germany, and explain the juxta position in the recent English and Dutch case-law. It will then proceed to question of the utility and timeliness of this institution followed by suggestions for its abolition or severe curtailment.

2. The CMR Rules on Successive Carriers

Chapter VI of the CMR is headed "Provisions Relating to Carriage Performed by Successive Carriers" and provides a number of specific rules as to the concept of successive carriership and the internal and external consequences flowing from this categorisation. Firstly article 34 gives a definition of successive carriage and determines some of the consequences.² It provides that a number of road

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¹ The United Nations Convention on International Carriage of Goods by Road 1956.

² CMR, art.34 reads: "If carriage governed by a single contract is performed by successive road carriers, each of them shall be responsible for the performance of the whole operation, the second carrier and each succeeding carrier becoming a party

carriers act as successive carriers where they perform the carriage governed by a single contract of carriage and where the second and each succeeding carrier takes over the goods and the CMR consignment note. Article 35 sets out the procedure for taking over the goods and the consignment note and for any succeeding carrier to provide a receipt to the previous carrier.³

One of the external consequences of carrying as a successive road carrier is that each carrier becomes responsible for the whole operation, irrespective of the length of his actual carriage and that he becomes a party to the contract of carriage, although only insofar as its terms are enshrined in the CMR consignment note which is handed down from carrier to carrier.⁴ However whilst this burdens all successive carriers involved in the operation with liability, cargo interests are only entitled to sue the first or the last carrier, or the carrier in whose care the goods were lost or damaged.⁵ Where suit can be brought against any of these carriers or against a number of them⁶ is determined by the general rules of chapter V and here article 31.1.⁷

There are also rules dealing with the relationship between the successive carriers inter se. Articles 37 and 38 provide that and how liability is to be shared between carriers, irrespective of which carrier has initially paid compensation in compliance with the Convention provisions. Where there is a carrier responsible for the loss or damage it shall be he who ultimately has to pay the compensation; where a number of carriers are responsible they shall pay in proportion to their liability and where this cannot be determined, they pay according to their share in the freight; where liability cannot be attributed to a particular carrier or carriers, again the share payable as compensation is determined by their share in the payment for the carriage.⁸ The same applies where a carrier has become insolvent; the remaining carriers must bear the burden of his share in compensation based on their share in the

to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note.”

³ CMR, art.35 reads:

“1. A carrier accepting the goods from a previous carrier shall give the latter a dated and signed receipt. He shall enter his name and address on the second copy of the consignment note. Where applicable, he shall enter on the second copy of the consignment note and on the receipt reservations of the kind provided for in article 8, paragraph 2.

2. The provisions of article 9 shall apply to the relations between successive carriers.”

⁴ CMR, art.34.

⁵ CMR, art.36; it reads: “Except in the case of a counter-claim or a set-off raised in an action concerning a claim based on the same contract of carriage, legal proceedings in respect of liability for loss, damage or delay may only be brought against the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred; an action may be brought at the same time against several of these carriers.”

⁶ See CMR, art.36, in fine.

⁷ This result corresponds with the wording and structure of the CMR and has recently been confirmed by the UK Supreme Court in *British American Tobacco Switzerland SA and others v (1) Exel Europe Ltd and (2) H Essers Security Logistics BV and another and British American Tobacco Denmark A/S and others v (1) Exel Europe Ltd and (2) Kazemier Transport BV* [2015] UKSC 65; [2016] A.C. 262; [2016] 1 Lloyd's Rep. 463, on appeal from [2013] EWCA Civ 1319; [2014] 1 Lloyd's Rep. 503, which was in turn on appeal from [2012] EWHC 694 (Comm); [2012] 2 Lloyd's Rep. 1 (hereafter *BAT v Exel*).

⁸ CMR, art.37; it reads: “A carrier who has paid compensation in compliance with the provisions of this Convention, shall be entitled to recover such compensation, together with interest thereon and all costs and expenses incurred by reason of the claim, from the other carriers who have taken part in the carriage, subject to the following provisions:

(a) the carrier responsible for the loss or damage shall be solely liable for the compensation whether paid by himself or by another carrier;

(b) when the loss or damage has been caused by the action of two or more carriers, each of them shall pay an amount proportionate to his share of liability; should it be impossible to apportion the liability, each carrier shall be liable in proportion to the share of the payment for the carriage which is due to him;

(c) if it cannot be ascertained to which carriers liability is attributable for the loss or damage, the amount of the compensation shall be apportioned between all the carriers as laid down in (b) above.”

freight.⁹ This CMR division of liability between carriers is, however, one of the very few CMR matters that can be amended and the carriers must do so by agreement if they wish to alter this scheme.¹⁰

In order to ensure that the validity of the payment of compensation cannot be contested by carriers from whom the paying carrier wishes to seek reimbursement later, he must ensure that these carriers are given due notice of the proceedings and are afforded an opportunity of entering an appearance.¹¹ In order to facilitate recourse claims and the appropriate distribution of liability between all successive carriers, suit can be brought against all successive carriers at the place of domicile of one of them.¹² Once judgment is given it shall be enforceable in the same manner as other CMR judgments.¹³ And most importantly, while the same rules for time bar apply as for cargo claims, the commencement of the limitation period is deferred until the date of judgment fixing the amount of compensation or, where there is no judicial decision, from the date of actual payment.¹⁴ The advantage of this provision is evident; it allows a carrier to complete his proceedings with cargo interests and thereafter affords him “full time” to pursue reimbursement. The disadvantage for any successive carrier who may be called upon to reimburse another of his fellow carriers is that he no longer can close his books after the ordinary time bar has lapsed and move on to concentrate on current business but is exposed to recourse claims for a significantly longer period.

All in all, successive carriership is a specialised concept with important internal and external consequences with respect to liability, exposure to suit and reimbursement claims between successive carriers, the latter with its special rules on jurisdiction and time bar. The concept is therefore dependant on its context to perform its function of safeguarding all parties to a CMR carriage as envisaged by the Convention.

3. Definition of Successive Carriers under English Law

The question of whether an interaction between carriers was indeed such that it fell within the definition of successive carriership arose in English courts many a time in the context of establishing or contesting the court’s jurisdiction or regarding the application of the time bar between carriers, but also concerning the defence of a carrier put up against a reimbursement claim, that another successive carrier was the one who had caused the loss and was thus the only one liable. In particular questions raised were what involvement of carriers was necessary and at what level the consignment note had to be issued for the carriage to be “performed by successive carriers”. The following questions arose and are considered in their context:

⁹ CMR, art.38; it reads: “If one of the carriers is insolvent, the share of the compensation due from him and unpaid by him shall be divided among the other carriers in proportion to the share of the payment for the carriage due to them.”

¹⁰ See CMR, art.40; it reads: “Carriers shall be free to agree among themselves on provisions other than those laid down in articles 37 and 38.”

¹¹ CMR, art 39.1: it reads: “1. No carrier against whom a claim is made under articles 37 and 38 shall be entitled to dispute the validity of the payment made by the carrier making the claim if the amount of the compensation was determined by judicial authority after the first mentioned carrier had been given due notice of the proceedings and afforded an opportunity of entering an appearance.”

¹² CMR Art 39.2; it reads: “2. A carrier wishing to take proceedings to enforce his right of recovery may make his claim before the competent court or tribunal of the country in which one of the carriers concerned is ordinarily resident, or has his principal place of business or the branch or agency through which the contract of carriage was made. All the carriers concerned may be made defendants in the same action.”

¹³ CMR, art.39.3, which reads: “3. The provisions of article 31, paragraphs 3 and 4, shall apply to judgements entered in the proceedings referred to in articles 37 and 38.”

¹⁴ CMR, art.39.4: “4. The provisions of article 32 shall apply to claims between carriers. The period of limitation shall, however, begin to run either on the date of the final judicial decision fixing the amount of compensation payable under the provisions of this Convention, or, if there is no such judicial decision, from the actual date of payment.”

a) Is it necessary that the contracting carrier performed any of the carriage?

This question and thus also whether a successive carriage could be performed by only one actual carrier, was put to the Court of Appeal in *Ulster-Swift Ltd. and Another v. Taunton Meat Haulage Ltd. and Another*.¹⁵ The turning point for the case was whether the time bar provision of article 39.4 applied¹⁶ to a claim for indemnity between carriers for compensation due to the consignor for the loss of his cargo¹⁷. As part of the answer to this question, the court had to decide whether the carriers involved were successive carriers in the meaning of article 34 CMR. The primary and contractual carrier T had not carried the goods but subcontracted the whole of the transportation to another carrier F who had issued the consignment note, naming the goods' owner as consignor and himself, F, as carrier. It had been accepted that the contract between the carriers T and F was on CMR terms and that a statutory CMR contract¹⁸ also existed between the actual road carrier F and the cargo owner. It had been argued by the actual road carrier F that T was not a carrier in the meaning of article 34 of the CMR, so that the ordinary one year time bar from the time of damage¹⁹ applied to their contract of carriage (i.e. the sub-contracted cargo transport).

F's argument failed. The Court of Appeal held that a person contracting for the whole of the carriage, even if not effecting any carriage himself, nor issuing the consignment note, was carrier under the CMR Convention, articles 1 and 34, and was thus the first carrier for the purposes of successive carriage as defined in article 34 and all other carriers thereafter carrying under the consignment note were successive carriers.²⁰ In *Rosewood Trucking Ltd v Balaam*²¹ the Court of Appeal reiterated this decision; all other sub-contractors in the chain before the performing carrier were all successive carriers, even if it was only the last one who actually carried the goods.

The viewpoint that the contractual carrier is not required to effect any of the transport himself is not shared universally,²² but has received much support, also for example in Austria, Germany, Switzerland and the Netherlands.²³ However, even the supporters argue that successive carriage still requires a continuous chain of carriers who are accepting the goods **and** the consignment note. And it must be the original consignment note; a new consignment note will not do.²⁴ This aspect was

¹⁵ [1977] 1 W.L.R. 625; [1977] 1 Lloyd's Rep. 346 (CA).

¹⁶ Which provides for the ordinary time bar, but the time starts to run for claims between successive carriers, only from the time of judgment fixing the amount or from the date of actual payment by the carrier claiming compensation.

¹⁷ Pork carcasses which deteriorated during the transportation and by the time of arrival had turned bad.

¹⁸ Based on the CMR consignment note issued by the driver of F for F as carrier and naming the cargo owner as consignor.

¹⁹ As provided directly by CMR, art. 32.1.

²⁰ See the discussion at [1977] 1 Lloyd's Rep. 346 (CA) 360 - 361.

²¹ [2005] EWCA Civ 1461; [2006] 1 Lloyd's Rep. 429 at 430.

²² This is rejected by Roland Loewe, "Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)" (1976) ETL 311 at 297, para 276; and see Koller, *Transportrecht, Kommentar*, (8th edn, Verlag C H Beck, 2016) (hereafter Koller), CMR, art 34, para 3, fn.15 referring to some cases from France, Germany and Belgium and see references in Schmidt, Herber, *Münchener Kommentar zum Handelsgesetzbuch, Band 7, §§ 407 - 619 Transportrecht* (3rd edn, Verlag C H Beck, 2014) (hereafter MüKo HGB), CMR, art 34, para 13, fn 19 (Jesser-Huß) to this effect. See Cour d'Appel de Paris, Pôle 5, 4^{ème} chambre, 14 septembre 2011, SA Helvetia / Transports Orhan-Seto, IDIT n°23628, Bulletin des Transports et de la Logistique n°3380 du 26 septembre 2011, p.539 discussing the concept of the "Commissionnaire de transport" in the context where the party contracting to carry does not carry himself.

²³ See Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa Law, 2014), para 50a(i) with reference to English, Austrian, Danish, French and German and Swiss case-law; see Koller, CMR, art 34, para 3f. referring to, in what seems to be the predominant view, decision from Germany, Austria and Switzerland to this effect; also MüKo HGB, CMR, art 34, para 14 (Jesser-Huß) with reference to Austrian, German, English and Dutch case law and also German literature; insofar see also Hartenstein, Reuschle, *Handbuch des Fachanwalts, Transport- und Speditionsrecht* (2nd edn, Carl Heymanns Verlag, 2012), Ch 12, para 230 (Koch/Shariatmadari); Schmid, Canaris, Schilling, Ulmer, *Staub, Handelsgesetzbuch, Großkommentar*, Band 7, Teilband 2 (4th edn, Walter de Gruyter, 2002) (hereafter Staub HGB), art 34, para 22 (Helm).

²⁴ See Clarke, para 50b and Staub HGB, art 34, para 21 (Helm); Koller, CMR, art 34, para 4; MüKo HGB, CMR, art 34, para 9-11 (Jesser-Huß).

however not argued in *Ulster-Swift*.²⁵ Thus it is questionable whether a true successive carrier relationship in the spirit of the CMR exists where the main contractor makes his contract of carriage with the sender,²⁶ and a later carrier to whom he sub-contracts²⁷ issues a consignment note for the whole carriage naming himself, rather than the main contractor as carrier.²⁸

This question was however addressed later in the Central London County Court.

b) Should it matter whether the first contractual carrier or a later carrier had issued the CMR consignment note?

In *Coggins T/A PC Transport v LKW Walter International Transportorganisation AG*²⁹ the plaintiff and the defendant contractor were in regular business relationship, where the plaintiff arranged transport for goods as per instruction from the defendant, usually by sub-contracting to other road carriers for this purpose. When the plaintiff claimed remuneration from the defendant for the carriage, the defendant declared a set-off with a cross-claim against the plaintiff for damages arising out of the loss of the consignment. The question was whether the plaintiff, who had himself sub-contracted the carriage of the ill-fated consignment, could be held responsible for the loss, since the successive carrier rules of the CMR burdened only the carrier who had caused the loss to bear liability.³⁰ The liability was however firmly with sub-contracted the road haulier, who had been found in possession of illegal drugs and the whole cargo load and all documentation thus had been impounded.³¹

According to HHJ Hallgarten QC, whether the plaintiff had become successive carrier in the operation depended on whether he had taken over the goods and the consignment note. The consignment note in the carriage concerned was, as usual in the business practises between the parties, issued to the road haulier, who on completion of the carriage sent the consignment note with an invoice to the plaintiff who then in turn invoiced the defendant, forwarding the original consignment note(s). The consignment note in question did not have an entry for the carrier and only stated as successive carrier the trailer number identifying the sub-contracting road haulier.

HHJ Hallgarten QC decided that the taking over of the goods and the consignment note could also take place via an agent: Where a sub-contractor was vested with authority to do such things as the principal would have done, had he performed the contract in person, the sub-contractor acted as agent also for the principal. The judge relied on a comment of Goff J, as he then was, in *SGS-Ates Componenti*

²⁵ See also Clarke, para 50b(i).

²⁶ Whether or not he issues his own consignment note.

²⁷ Directly or via a chain of sub-contracts.

²⁸ In English law one may mostly be able to come to a contractual relationship including the primary contractual carrier as carrier under the CMR consignment note by means of implied (and possibly undisclosed) agency, so that the carrier issuing or taking over the consignment note does so also on behalf of the carriers up the chain (even if he does not disclose any agency relationship for the issue of the consignment note) – see Messent, Glass, Hill & Messent, *CMR: Contracts for the International Carriage of Goods by Road* (3rd edn, LLP, 2000) paras 11.19 f and 11.42 f; Glass and Cashmore, *Introduction to the Law of Carriage of Goods* (Sweet & Maxwell, 1989), para 7.74; Clarke para 50b(i) and *Coggins T/A PC Transport v LKW Walter International Transportorganisation AG* [1999] Lloyd's Rep 255 (CLCC (BL) = Central London County Court (Business List)) as discussed below. On agency in general in the carriage context see Bugden and Lamont-Black, *Goods in Transit* (3rd edn, Sweet & Maxwell, 2013) chs 1 and 2.

²⁹ [1999] Lloyd's Rep 255 (CLCC (BL) = Central London County Court (Business List)).

³⁰ CMR, art. 37(a).

³¹ The plaintiff argued he was successive carrier and according to article 37(a) CMR, the defendant a) could only claim against any successive carriers once he had paid compensation to the cargo owner and that b) the road haulier was the only carrier responsible and liable so that a claim against the plaintiff had to fail. It was not disputed that the carriage was governed by a single contract of carriage between the defendant and his customer.

*Elettronici SpA v Grappo Ltd*³² that acceptance of the consignment note did not require physical acceptance, but could take place through the intermediary of a servant or agent. However the comments referred to arose out of a rather different context: Goff J.'s case did not deal with the question whether the consignment note could be accepted by a person through another, but whether a person had accepted a consignment note within the meaning of article 34, even if he had not entered his name and address on the consignment note as foreseen in article 35.³³

Further in *Coggins* and with reference to *Ulster-Swift*, and rejecting the opposite view expressed by Clarke³⁴, HHJ Hallgarten QC viewed it irrelevant that a consignment note was issued further down the chain and not by the contractor or sub-contractor; in his mind to require this made no commercial or legal sense.³⁵ He found therefore that the consignment note was issued and accepted by a later carrier for all carriers up the chain, so that all carriers involved in the different sub-contracts, were in a successive carrier relationship. The defendant could therefore, according to article 37(a) CMR, only claim damages from the road haulier, as the carrier causing the damage; thus the set-off against the plaintiff as intermediate sub-contracting carrier failed.

The decision was noted with approval in other English proceedings³⁶ and provided the parties' common ground in the proceedings of *BAT v Exel* in the UK Supreme Court. *Coggins* can also be conceptualised in English domestic law as being an application of the agency principles of the undisclosed principal. It is however hardly appropriate to base a crucial interpretation of a concept of an international convention on a national law principle.³⁷ In Germany, for example, the court decisions and commentaries require the successive carrier to take over the consignment note which is signed by the sender and the contracting carrier.³⁸ It is therefore not enough that a sub-contracting carrier collects the goods and the consignment note from the sender.

c) Successive carriers only if carriers under the same contract?

Less controversial was the issue raised in *Flegg Transport Ltd v Brinor International Shipping and Forwarding Ltd*³⁹, where Mark Cawson QC decided that successive carriers could only be such carriers

³² [1978] 1 Lloyd's Rep. 281 (QB), 284, Goff J: "...there remains the question- what is meant by the expression 'acceptance of the consignment note' in art. 34? In my Judgment, these words are to be given their natural and ordinary meaning unless the context otherwise requires; and the natural and ordinary meaning of the words is simply that the consignment note is, like the goods - indeed normally with the goods - accepted when it is taken over by the carrier concerned, by himself or through his servant or agent, with a view to carrying out the next part of the carriage of the goods pursuant to the terms of the consignment note."

³³ It was held that documentary completion in form of insertion of the carrier's details was not a pre-requisite. To hold otherwise would mean a successive carrier could escape liability by omitting to enter his details. A further argument to this end would also have been the reference of article 35.2 to article 9 as between carriers, highlighting the mere prima facie function of the details entered in the consignment note.

³⁴ International Carriage of Goods by Road: CMR, 2nd edn, Sweet & Maxwell, 1991 at 278.

³⁵ [1999] Lloyd's Rep 255, 259 - 260.

³⁶ See *Flegg Transport Ltd v Brinor International Shipping and Forwarding Ltd* [2009] EWHC 3002 (QB) (distinguished for other reasons; see below).

³⁷ See Vienna Convention on the Law of Treaties, art. 31 and see also Clarke, at 50 (b) (i).

³⁸ See Koller, CMR, art 34, para 4, referring to BGH, TranspR 2007, 416; Staub, CMR, art 34, para 22 referring with approval to OLG Düsseldorf, TranspR 1988, 425, 426f.; and see also Thume, *Kommentar CMR, Übereinkommen über den Beförderungsvertrag im internationalen Straßengüterverkehr* (3rd edn, Deutscher Fachverlag GmbH Fachmedien Recht und Wirtschaft, 2013) (hereafter Thume), art 34, paras 4, 6 (Schmid).

³⁹ [2009] EWHC 3002 (QB). Here a carrier F, who had contracted with the cargo owner for carriage from London to Germany and interim storage of the goods at his premises, sued carrier B, to whom he had sub-contracted the carriage of the goods from his premises to Germany, and carrier C, who was engaged by B and who carried out the sub-contracted transport. The consignment note issued by C, stated F as sender, C as carrier and B as successive carrier, although B never took part in the actual transportation. The place of delivery of the goods for carriage was stated as F's place of business where the goods had been stored in the interim, after F had collected them from the cargo owner, the sender under the (larger) contract of

who carried under the same CMR consignment note. Where a carrier contracted with a cargo owner for the full journey, transported the goods in part himself and thereafter engaged sub-contractors for the further leg who, in turn, issued a consignment note for this (shorter) leg only, these sub-contracting carriers could not be classed as successive carriers to the primary carrier; they did not carry the goods over the same journey and did not carry under the same contract. According to Mark Cawson QC, it was a requirement that a successive carrier took over the goods and the consignment note and while a carrier may be able to accept these for a carrier higher up the chain,⁴⁰ he could only do this for the contract covered by the consignment note and no other. Here separate contracts had been involved.⁴¹

That more than one CMR contract could spring from an original contract of carriage had also been an issue in *Harrison & Sons Ltd v Steward Transport Ltd*, particularly where separate CMR consignment notes were issued further down the chain. Also in this case, carriage under different contracts had not been seen as successive carriage⁴² and similarly in *Arctic Electronics Co (UK) Ltd v McGregor Sea & Air Services Ltd*,⁴³ where three different road carriers under different consignment notes transported a part each of the goods over a part of the overall journey. They were held not to carry as successive carriers to each other, but separate from each other, with the result that the special rules of jurisdiction under 39.2, which required that the carriers concerned were successive carriers, was not fulfilled.⁴⁴

carriage between cargo owner and F. B argued to be a successive carrier to F and thus sought the claim against him to be struck out. Since he had not taken part in the carriage which had been performed by C during which the goods were damaged, B argued that it was C only and not B who was liable according to article 37(a). This argumentation proved unsuccessful.

⁴⁰ Thus noting *Coggins* with approval.

⁴¹ One of these contracts was between the primary carrier F and the cargo owner for the full transportation (London to Germany) and storage. And then there was another contract for carriage from F's premises to Germany between F as sender and B which was confirmed by the consignment note issued by C. For more details see [2009] EWHC 3002 (QB), paras 39 – 43.

⁴² [2009] EWHC 3002 (QB), para 43. The case concerned the carriage of a second-hand printing press from Milan to High Wycombe. The buyer engaged a forwarding agent C to arrange the carriage. The contract was made with carrier L who entirely subcontracted the transportation to SO, who also entirely sub-contracted the journey to F who in turn subcontracted the journey to E and ST for consecutive legs. The press was loaded and a consignment note was issued in Italy for the whole of the journey. The press shifted during the first leg, was re-stowed and a note of warning was added to this effect on the Italian consignment note. During the second leg in England undertaken by ST the press fell off the trailer. ST had not been given the Italian consignment note with the warning as to the shifting load, but had been issued a CMR note only for its leg of the journey by agents of F. The buyer sued ST, F and L for damage to the press and F issued contribution notices to E and SO. Both E and SO accepted that they were successive carriers under the CMR, having both accepted the goods and taken over the consignment note, but contested jurisdiction in England. They submitted that ST was not a successive carrier and that his place of domicile could therefore not be taken as founding jurisdiction on them as per article 39.2 CMR. The court agreed that ST was not a successive carrier, but then found a different way to interpret the notion of carrier of article 39 in the light of the UK implementing Act (sub-sections 14(2)(c) and (d) of the Carriage of Goods by Road Act 1965) in order to found jurisdiction. An approach which, it is submitted, is not in line with the CMR or the provisions on treaty interpretation in the Vienna Convention on the Law of Treaties, art.31, and a similar argument was also seen as unconvincing in *Hatzl v XL Insurance Co Ltd* [2009] EWCA Civ 223; [2010] 1 WLR 470.

⁴³ [1985] Lloyd's Rep 510 (QB).

⁴⁴ The purchaser of 20 video game machines engaged the UK defendant M to arrange transport of the machines from Tapei to Edinburgh. The defendant employed the third party C to carry them from Tapei to London. The goods were shipped from Tapei under a single air waybill with destination London issued by or on behalf of C and separating transport as follows: by first carriers to 'Lux' and onwards by truck. After air carriage to Luxembourg the consignment was split into 3 loads for land carriage to London by three different hauliers, two from Luxembourg and one from England under 3 different CMR notes. On delivery of the goods in London some machine parts of each consignment were damaged. The UK defendant M claimed an indemnity from the third party C and C sought to bring the 3 road hauliers as fourth parties into the proceedings. One of the Luxembourg hauliers, road carrier L contested jurisdiction. The question was whether jurisdiction could be founded on the basis of article 39.2, using the place of business of the English haulier as necessary anchor to the English courts. This was declined; Hobhouse J, as he then was, decided that the separate consignments by the different road hauliers did not qualify as successive carriage from each other.

The view that successive carriers have to carry under the same contract is also widely accepted in continental Europe,⁴⁵ but can this be said of other parts of the requirements of article 34? Did the CMR truly envisage some “successive carriers” being wholly remote from the cargo and the CMR consignment note as seemingly accepted by the English courts?

4. The Mischief

The UK Supreme Court – *BAT v Exel*

It is suggested not; significant doubt over the afore-mentioned approach as created by the combined effect of *Ulster Swift* and *Coggins v LKW Walter* seems to have been voiced by Lord Mance in *British American Tobacco Switzerland SA and others v Exel Europe Ltd and others*.⁴⁶ In this case the primary carrier Exel sub-contracted the transportation of two consignments of tobacco products to Essers and Kazemier. The latter collected the goods and issued consignment notes in their name as carriers naming the respective cargo interests as consignors. The parties had proceeded on the understanding that all carriers involved were acting as successive carriers, yet Lord Mance opined:

“12 The common ground between the parties in the present case involves necessarily their acceptance that one or other of the Essers companies in the case of the first container and Kazemier in the case of the second was a successive carrier within article 34. In this connection, the present parties are content to proceed on the basis, said in Professor Malcolm Clarke's work *International Carriage of Goods by Road: CMR*, 6th ed (2014), para 50a(i) to be “disputed” but accepted by both Donaldson J and the Court of Appeal in *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1975] 2 Lloyd's Rep 502, 507; [1977] 1 Lloyd's Rep 346, 358–361 and by other national courts, that, where (as here) a company contracts to carry goods, but subcontracts the whole performance, the first company is for CMR purposes the first carrier, while the second becomes a successive carrier. Further, although article 4 of CMR provides that “The contract of carriage shall be confirmed by the making out of a consignment note”, it continues by saying that “The absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage which shall remain subject to the provisions of this Convention.”

13 However, article 34 provides that a second or succeeding carrier only becomes a successive carrier by “becoming a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note”. At this point, therefore, it might seem that the existence of a CMR note was of importance, and Professor Loewe, in a “Commentary on the Convention of 19 May

⁴⁵ Whether in Austria, France, Germany, the UK or the Nordic countries: See Clarke, para 50b; MüKo HGB, CMR, art 34, para 8 (Jesser-Huß); Thume, art 34, para 3 (Schmid); Koller, CMR, art 34, para 3 and Staub HGB, CMR, art 34, paras 10, 15 (Helm). See also Selvig, *Kommentarer 2000 – 2001, Nordiske Domme I Sjøfartsanliggender* [2001] pp. xii – xvii giving an overview and commentary over the Nordic jurisprudence on the CMR successive carriers' discussion under the Danish Carriage of Goods by Road Act and the Norwegian Road Carriage Act 1974 and highlighting that carriage under a shorter sub-contract does not qualify for carriage under this category; rather carriage under the very same contract is required and that this contract must be effected by several carriers. (Many thanks go to Professor Erling Selvig for the discussion on the cases and his commentary and Professor Erik Røsæg for his guidance and information on Nordic law in general (many thanks go also to Bård Breda Bjerken for his help with providing translation from the Norwegian text. Any possible mistakes are my own.) And see Loewe, (1976) ETL 311 at 296, para 274.

⁴⁶ *British American Tobacco Switzerland SA and others v (1) Exel Europe Ltd and (2) H Essers Security Logistics BV and another and British American Tobacco Denmark A/S and others v (1) Exel Europe Ltd and (2) Kazemier Transport BV* [2015] UKSC 65; [2016] A.C. 262; [2016] 1 Lloyd's Rep. 463; on appeal from [2013] EWCA Civ 1319; [2014] 1 Lloyd's Rep. 503, which was in turn on appeal from [2012] EWHC 694 (Comm); [2012] 2 Lloyd's Rep. 1 (hereafter *BAT v Exel*).

1956 on the Contract for the International Carriage of Goods by Road (CMR)", prepared for the United Nations in 1975 and expressed at para 16 to be "based on the preparatory work, on personal notes and recollections of the negotiations, and on the logic and spirit of the Convention itself", indicates at para 275 that the language of article 34 was directed to ensuring that successive carriers were made aware through the consignment note that the carriage which they were undertaking (perhaps only for one part, and possibly even within only one country's territory) was international carriage subject to the provisions of CMR. There appears in the present cases at least a real possibility that the two CMR consignment notes only came into existence at the time when the relevant Essers company and Kazemier collected the respective consignments and signed the relevant CMR consignment notes. *Whether article 34 can apply to such a case is a point which we can however leave open, since the parties are prepared without further examination to proceed on the basis that these appeals both concern successive carriage, by the relevant Essers company or companies and by Kazemier, within the terms of article 34.*⁴⁷

The Dutch Supreme Court – *Beurskens v Veldhuizen*

Yet in its decision of 11 September 2015 the Dutch Supreme Court in *C&V Veldhuizen Holding B.V. v Beurskens Allround Cargo B.V.*⁴⁸ in, what appeared to be a change from its previously held narrow view of the article 34 requirements⁴⁹, seems to adopt an extended approach, closer to that of the parties in the English case of *BAT v Exel*, in applying the provisions of Chapter VI to the relationship between the merely contractual carrier (the 'carrier on paper') and his sub-contractor, the performing or actual⁵⁰ carrier.

Hewlett Packard (HP) instructed the German logistics provider Trans-O-Schnell Lieferdienst GmbH (T) to carry computer equipment by road from The Netherlands to Germany. T instructed the Dutch carrier Beurskens Allround Cargo B.V. (B) with the transportation, who in turn instructed C&V Veldhuizen Holding B.V. (V), another Dutch carrier. V collected the goods and issued a CMR consignment note to HP's warehouse as consignor with no entry as to the carrier or successive carriers. Some of the goods were subsequently stolen while the vehicle was parked at V's premises. T paid the full damages for the stolen goods to HP and the sued his contracting party B in Germany. B sought to rely on the package limitation but was unsuccessful insofar⁵¹ and had to pay the full value in damages to V. B then initiated proceedings against V in the Netherlands arguing that V as the successive carrier responsible for the loss of the goods should reimburse B for the compensation it had paid to T.⁵²

The case eventually reached the Dutch Supreme Court, who accepted an extended view of the application of the successive carrier provisions of Chapter VI of the CMR. In so doing, it referred to the Vienna Convention⁵³ on interpretation of the convention and suggested that object and purpose of Chapter VI of the CMR aimed at enhancing recovery prospects by both, cargo interests against successive carriers and carriers seeking recourse; and that a wide interpretation also aligned with

⁴⁷ Emphasis added.

⁴⁸ Case Nr. 14/03211; NJB 2015/1635, S&S 2016/1.

⁴⁹ See Rutger van Dijk, Annemiecke Spijker, "Beförderung durch aufeinanderfolgende Frachtführer (Art. 34 - 40 CMR); Der niederländische Oberste Gerichtshof entscheidet sich mit Veldhuizen/Beurskens für die 'weite Auslegung'; Art. 34 CMR", *TranspR* 2016, 341 at 342.

⁵⁰ Both terms are used interchangeably.

⁵¹ The German court had found that V had acted with gross negligence.

⁵² In accordance with CMR, art.37(a).

⁵³ Vienna Convention on the Law of Treaties 1969, art. 31.1 and 31.3.

‘accepted opinions in other CMR contracting States’. Whether the latter statement is indeed accurate is however very questionable and a number of authors have shown this to be otherwise.⁵⁴

While the Supreme Court found that neither T nor B were successive carriers as they had not accepted the goods,⁵⁵ V as performing carrier was successive carrier and the provisions of articles 34 of the CMR could be interpreted as also applying in this setting. A cargo owner could sue his contracting party, the primary and contractual carrier, but also the performing carrier, as successive carrier, according to Articles 36. As regarding recourse, the contracting and sub-contracting carriers on paper could seek reimbursement from the performing carrier as successive carrier on the basis of articles 37 ff. The amount of the compensation determined by a judgment against the carrier on paper could not be disputed if the steps of article 39 had been taken, i.e. that the successive carrier had been given due notice of the proceedings and had had an opportunity to enter an appearance. This meant in this case that the Dutch court deciding the recourse claim had to accept the German decision, based on a much more lenient view on breaking limitation. That the proceedings against the carrier on paper were not on the basis of the successive carrier provisions did not matter. However, this did indeed matter in England in *Rosewood Trucking Ltd v Balaam*.⁵⁶

The English Court of Appeal – *Rosewood Trucking v Balaam*

In contrast to the Dutch Supreme Court decision, the facilitation of recourse above all was not the overriding concern of the English Court of Appeal in *Rosewood Trucking Ltd v Balaam*.⁵⁷ The sender of goods contacted with P&O Ferrymasters (P&O) for carriage of a consignment of television sets from Spain to England for which P&O issued a CMR consignment note. P&O sub-contracted the entire carriage to Rosewood Trucking (R). The sub-contract prohibited further sub-contracting without consent, yet also made R responsible for the cargo “as if it had itself performed or failed to perform the carriage”. R sub-contracted the whole transportation to another carrier, LB Shipping, who in turn sub-contracted to Brian Balaam (B). B collected the consignment and signed the consignment note. However before he could deliver the goods to the consignee, the whole of the consignment was lost when the trailer with its entire content was stolen from a yard near Norwich. P&O paid the consignor’s claim for his loss and obtained in turn his indemnity from R according the terms of their sub-contract. R thereafter sought to recover the compensation paid from B on the basis of article 37(a) of the CMR, arguing that B was, like R, a successive carrier in the chain and B was the one who had caused the loss and was thus solely liable for the compensation R had paid.

This, the Court of Appeal rejected; payment by R had not been made as a successive carrier but due to his contract terms with P&O. Therefore R had not paid as successive carrier; indeed he would not have been liable as successive carrier. He could not be sued by cargo, as he was not the first or last, or the carrier in whose charge the goods were stolen as per requirements for suit under article 36 of the CMR, nor was he the carrier responsible for liability according to Article 37(a) of the CMR, so he would not have had to pay under the recourse regime of the CMR. However recourse as successive carrier

⁵⁴ See Rutger van Dijk, Annemiecke Spijker, “Beförderung durch aufeinanderfolgende Frachtführer (Art. 34 - 40 CMR); Der niederländische Oberste Gerichtshof entscheidet sich mit Veldhuizen/Beurskens für die ‚weite Auslegung‘; Art. 34 CMR”, TranspR 2016, 341 at 344; Rutger van Dijk, „Hoge Raad der Nederlanden 11 september 2015 – Veldhuizen v. Beurskens – 14/03211”, (2016) 16(1) Tijdschrift voor Internationale Handel en Transportrecht 48 at 59 f. and Michiel Spanjaart, “The successive carrier: a relic from the past”, (2016) 21 Unif. L. Rev. 522 at 530 ff.

⁵⁵ It therefore rejected the extra-wide successive carrier interpretation, that included non-carrying contracting carrier, akin to the English decisions cited above, and as taken by the Gerechtshof ’s-Hertogenbosch of 4 March 2008 in “Penske v Pfefferkorn” (S&S 2011/34); see Rutger van Dijk, Annemiecke Spijker, “Beförderung durch aufeinanderfolgende Frachtführer (Art. 34 - 40 CMR); Der niederländische Oberste Gerichtshof entscheidet sich mit Veldhuizen/Beurskens für die ‚weite Auslegung‘; Art. 34 CMR”, TranspR 2016, 341 at 341.

⁵⁶ [2005] EWCA Civ 1461; [2006] 1 Lloyd's Rep. 429.

⁵⁷ [2005] EWCA Civ 1461; [2006] 1 Lloyd's Rep. 429.

could only be sought “for compensation paid in compliance with the provisions of this Convention”. This was not the case, as the compensation had been paid under the contract with P&O. While it might have been unfortunate that R could not pass on what he had paid, he could have protected himself by appropriate terms with his contracting party, LB Shipping, or sought assignment of P&O’s claim against B. R had not done so and thus had to bear the burden himself.

This decision may however put an interim carrier in the chain in a difficult position: if he pays his contractor, he might not get reimbursed under Chapter VI by the carrier at fault. Yet, the interim carrier’s success in refusing to pay compensation to his principal under the sub-contract, based on the argument that final liability is that of a “successive carrier’s” down the line, depends in international transportation entirely upon all potential jurisdictions, in which he may be sued,⁵⁸ applying the concept of successive carriage uniformly and in the same manner. However, as the above comparison of cases shows, a unified approach is hardly to be found. Thus, maybe the solution is indeed better found by careful negotiation of the various contracts and sub-contracts in order to clarify the relationships and possible recourse rights of the parties by contract. However, since the CMR rules are mostly mandatory, there is little room to manoeuvre within the CMR rules, yet the division of liability between (assumed) successive carriers can be agreed by contract between carriers.⁵⁹

5. The Need for the Concept of Successive Carriers?

As seen above, there are many nuances in interpreting the successive carrier rules of the CMR and, often, the application of these rules was motivated by outcome: the time bar, or the rules on division of liability between carriers inter se, or the founding of jurisdiction via one of the successive carriers for all, seem to have been a driving force. Yet, is this necessary for a fair distribution of risk and liability? Should the chapter VI provisions be applicable to mere sub-contracting or, alternatively, should at least the extended time bar apply to recourse claims between sub-contracting carriers? Are the consequences of an extended application even desirable and what can be concluded from a comparison with other transport conventions? These matters will be considered in the following:

a) Should the successive carrier system apply to sub-contracting?

Historical background

What seems clear from the wording, context and content of the Chapter VI provisions is that the system was conceived and based on the idea and (former) practice that carriers carry cargo for individual parts of a larger journey and pass the goods and the respective CMR consignment note, from one carrier to the next, like a baton in a relay-race.⁶⁰ Professor Loewe, in his commentary on the CMR, which was based on the notes and recollections of the author of the negotiations of the convention, specifically highlights that Chapter VI was not meant to be applied to mere sub-contracting: “Where a person concludes a contract of carriage as a carrier but does not himself perform any part of the carriage, the provisions of articles 34 et seq. cannot be applied.”⁶¹

⁵⁸ Particularly due to the wide jurisdictional rules of CMR, art 31.1, which cannot be limited by a jurisdiction agreement.

⁵⁹ CMR, art. 40.

⁶⁰ As coined in German as “Staffeltransport” (relay-transport).

⁶¹ Roland Loewe, “Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)” (1976) ETL 311 at 297, para 276.

This intention and understanding can also be deduced from the origin of the successive carrier concept in rail transport in COTIF-CIM⁶², dating back to the earliest provisions of successive carriage in CIM 1890⁶³. After its revision in 1952, the then CIM successive carrier rules provided the model for the equivalent CMR provision of 1956.⁶⁴ CIM in these earlier versions, until the 1999 revision, was based on the system of track and line monopoly of the railways in each country, which made cross-border rail transport impossible without successive carriage. This system, however, if ever it was, is no longer comparable to transport by road. It was thus argued that chapter VI of the CMR were mostly dead provisions⁶⁵ unless their requirements and sphere of application was interpreted so widely that it no longer related to the wording, reasons for and intention behind the provisions.⁶⁶ In particular, the decision in *Ulster-Swift* has been criticised on the continent and, for example, in German commentaries as being driven by outcome and breaching the structure and systematic approach of the CMR.⁶⁷ For all the above reasons of obsolescence of the successive carrier concept, FIATA brought a proposal in 1984 to abolish the concept altogether.⁶⁸

Wording of the provisions and effect

When reading articles 34 and 36, the wording clearly suggests that all carriers carry one after another under the same contract.⁶⁹ This is further supported by the content of the rules on division of liability: these rules suggest a share in liability according to the share in the freight payment, unless liability is clearly identifiable to one or more specific carriers.⁷⁰ For such successive carrier claims, where liability is divided between them, it is necessary that all successive carriers can be made party to the same proceedings, as enabled by the Chapter VI jurisdictional rule of article 39.2 of the CMR, to distribute the liability between them appropriately and finally. These jurisdictional rules therefore are unique and specific to this situation.⁷¹

Where however the claims are not based on a successive carriage relationship but on the basis of a sub-contract only, the separate sub-contract should be given effect as between the parties to it. In the context of sub-contracting there is no share in the carriage charges payable by the cargo owner. Each contract is made between its individual (two) parties for an agreed freight for the transportation; firstly between the cargo owner/sender and the primary/contractual carrier; then between this primary carrier and a sub-contracting carrier; then between the sub-contracting carrier and the sub-sub-contracting carrier, and so on, until the chain ends with the performing carrier. The general rules

⁶² CIM stands for Uniform Rules Concerning the Contract of International Carriage of Goods by Rail, being Appendix B to the Convention concerning International Carriage by Rail 1980 in the version of the Protocol of Modification of June 3, 1999 (COTIF); see CIM 1999, art.26 on successive carriers. In the previous version of CIM, CIM 1980, a similar provision is found in art.35.2.

⁶³ The then International Convention concerning the Carriage of Goods by Railway (CIM) of 1890.

⁶⁴ On the development of the successive carrier provision in CIM and CMR see Michiel Spanjaart, "The successive carrier: a relic from the past", (2016) 21 Unif. L. Rev. 522 at 522 - 525.

⁶⁵ Loewe, "Commentary on the Convention of 19 May 1956 on the contract for the International Carriage of Goods by Road (CMR)", [1976] ETL 311, 396, [274]; MüKo HGB, CMR, art 34, para 7 (Jesser-Huß); Thume, Vor art 34, para 3 (Schmid); Schmid, Canaris, Schilling, Ulmer, *Staub, Handelsgesetzbuch, Großkommentar*, Band 7, Teilband 2 (4th edn, Walter de Gruyter, 2002 (hereafter Staub HGB), art 34, CMR, para 5 (Helm).

⁶⁶ See MüKo HGB, CMR, art 34, paras 6-7 (Jesser-Huß). See also Michiel Spanjaart, "The successive carrier: a relic from the past"(2016) 21 Unif. L. Rev. 522.

⁶⁷ MüKo HGB, CMR, art 37, para 2 - 3 and art 39, para 2 (Jesser-Huß). See also the discussion of the requirements of art 34 in MüKo HGB, CMR, art 34, para 6 (Jesser-Huß); Staub HGB, art 34, CMR, para 20-24 (Helm).

⁶⁸ See Glöckner, "Die Vorschläge der FIATA zur Reform der CMR", TranspR 1984, 113, 114 f.

⁶⁹ CMR, art.34: "...performed by successive road carriers, each of them... .. the second carrier and each succeeding carrier becoming party..."; art.36: "the first carrier, the last carrier or the carrier...".

⁷⁰ See CMR, art 37 (b) and (c), dividing liability in case of (b) between a number of carriers responsible for the loss or damage or in case of (c) amongst all carriers where it could not be ascertained to which carrier liability was attributable to; and see art 38 for a similar solution in case of insolvency of one of the carriers.

⁷¹ See also BAT v Exel [2015] UKSC 65; [2016] A.C. 262; [2016] 1 Lloyd's Rep. 463 at para 37; and see Ensthaler, *HGB* (7th edn, Luchterhand, 2007), CMR, art 39, paras 5-6.

of the CMR, outside of chapter VI, should then be applicable to this contractor - sub-contractor relationship, including the general rules of jurisdiction, only.⁷²

In this chain of sub-contracts, the performing carrier will normally end up with the smallest freight payment and the full responsibility for the goods. He, very often, will not be in a position to negotiate particular terms, but he will carry according to the parameters (journey, route, rest places, additional drivers or not, etc.) as agreed higher up the chain. He will accept the carriage and his contracting party/parties – a carrier and, very likely, also the cargo owner to whom he may issue or sign a CMR consignment note, but he is unlikely to have consciously agreed to be liable to all other carriers up a chain of sub-contracts (“carriers” who he does not know, and mostly is not aware of and/or has any information on), nor to the consequences of acting as successive carrier; even more so if the courts themselves are unclear when successive carriage comes into play. One may also wish to ask the question what in turn is the consideration contributed by any of the carriers up the chain, who are earning more freight than the performing carrier? The division of liability rules clearly do not apply to them as these sub-contracting carriers are not involved in the transportation.

The CMR and its rules on liability, limitation and time bar were carefully considered and were intended to strike a balance between cargo interests and carrier interests. This is also why the CMR is a double mandatory system that cannot be contracted out of in favour of the sender or the carrier.⁷³ Both sides were intended to be safeguarded, and the carrier was supposed to be able to calculate his exposure and to close his books after the time bar period has lapsed in order to focus on the day-to-day business.⁷⁴ This is however not the case, if a carrier has to expect recourse claims for an extended period, from carriers further up in a chain, whose identity he does not know; not at the time of contracting and possibly not even later until he is drawn into proceedings.

That a carrier is liable towards his contracting party is clear and that he can calculate his exposure to suit in different jurisdictions depending on the place of business of his contracting party and the cornerstones of the transportation, the places of taking over and that designated for delivery according to article 31.1 of the CMR.⁷⁵ To then, without more, add all other countries of the primary and all sub-contracting carriers in the chain for any recourse claims according to article 39.2, with whom the performing carrier made no contract, seems wholly inappropriate, unless the carrier was warned or put on guard, which according to the wording of article 34 was supposed to be achieved by the taking over of the goods and the consignment note, which was to include the names of the other carriers.⁷⁶ It is therefore submitted that Chapter VI is unsuitable to be applied to matters of mere subcontracting and broad inroads create uncertainty and may lead to undesirable consequences.

Undesirable consequences of broad interpretation

⁷² According to CMR, art.31.1.

⁷³ See CMR, art.41, which reads: “1. Subject to the provisions of article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract.

2. In particular, a benefit of insurance in favour of the carrier or any other similar clause, or any clause shifting the burden of proof shall be null and void.”

⁷⁴ See MüKo HGB, CMR, art 32, paras 2, 22 - 24 (Jesser-Huß). Or more general, the shortness of the period being justified by the nature of the transportation business; see Krijn Fake Haak, *The liability of the carrier under the CMR*, (Stichting Vervoeradres, The Hague, 1986) p 295.

⁷⁵ See CMR, art.31.1, which reads: “1. In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:

(a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or

(b) The place where the goods were taken over by the carrier or the place designated for delivery is situated.”

⁷⁶ See CMR, art.34 and 35 and see Roland Loewe, “Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)” (1976) ETL 311 at 296 et seq., paras 274-275.

A broad interpretation, as in the recent Dutch Supreme Court decision, while allowing the alignment of compensation between different parties and thus full recourse, might, on the other hand, open the floodgates to forum shopping even further: it will become even more important to open court proceedings as fast as possible in the most advantageous forum, to possibly join as many parties to the proceedings or at least notify them, so that the effect of the proceedings will be upheld in recourse claims.

The Dutch extended view would mean that any carrier in the chain can then seek recourse from the performing carrier down the line, irrespective when and why it had paid compensation and base its recourse amount on any court judgments fixing the amount of compensation as long as the performing carrier was notified of the proceedings.

To safeguard his position in this extreme, it would then become advisable for every performing carrier, ideally even before delivery of the damaged goods or notice of their loss to the consignor and to his contractor, to start proceedings for non-liability or for liability to the value of the package limitation only, while involving as many others in the chain of sub-contractors as possible. However he is unlikely to know them all. But more so, to push every cargo claim to the court system to safeguard the position of the performing carrier seems an immense waste of resources.

b) Article 39.4 time bar by analogy as necessary alternative?

Is the short time bar of article 32.1 of the CMR prohibitive and thus acting as an unfair barrier to recourse?

Within the CMR

Should the time bar of article 39.4 therefore be applied instead to all proceedings between carriers, whether successive or not? If one saw the carriage sub-contract rather than one leading to a successive carrier relationship as a separate contract which was also based on the CMR,⁷⁷ then the contractual arrangements between the carriers would prevail and as such also the provisions of the CMR on time bars. If one interpreted article 39.4 in its standing in chapter VI as requiring true successive carriage,⁷⁸ this would leave only the shorter time bar of article 32.1. Would this be a critical problem? It would require the contracting carrier to be prudent and to stay attuned to the performance of the transportation and, where necessary, to give immediate notice of loss or damage to his sub-contractor⁷⁹ and to make a claim; a written claim, after all, suspends the period of limitation until the carrier rejects the claim by notification in writing and returns the documents attached thereto.⁸⁰

Thus a primary contractor/carrier sub-contracting the carriage to another could maintain his interests even without needing a longer period of limitation, but he would certainly have to be proactive in managing claims.⁸¹ He could also attempt to drive the sub-contractor into action – insofar as practicably viable – by setting off any potential damages against the carriage charges due to the sub-

⁷⁷ If international carriage from or to a contracting state was effected, see CMR, art 1.1.

⁷⁸ See MüKo HGB, CMR, art 37, para 2 - 3 and CMR, art 39 para 2 (Jesser-Huß); Thume, art 39, para 2 (Schmid) and Koller, CMR, art 39, para 5 and see Clarke, para 44b(i). See also *Flegg Transport Ltd v Brinor International Shipping and Forwarding Ltd* [2009] EWHC 3002 (QB) and *Arctic Electronics Co (UK) Ltd v McGregor Sea & Air Services Ltd* [1985] Lloyd's Rep 510 (QB). For the facts of these cases see [above at 3c](#).

⁷⁹ See CMR, art.30.

⁸⁰ CMR, art 31.2.

⁸¹ And according to MüKo HGB, CMR, art 32, para 24 (Jesser-Huß) this is to be expected of him; see also discussion at paras 2 and 22 - 23.

contractor, but this may be of limited success.⁸² While the time bar for any such carriage charges does not fall within the extended period of article 39.4 but is determined by the (ordinary) article 32.2 rules, the effects of sub-para (c) of the time period commencing 3 months after the contract of carriage was made, leads mostly to a slightly longer timeframe.⁸³

Irrespective of such different actions, the primary contractor may still be put in a position where his sub-contractor rejects the claim, but he himself has insufficient information and little access to evidence to decide the best strategy. Would he thus be pushed to reject the claim in his relationship with the cargo claimant too⁸⁴ to ensure that, in case he gets sued, this will still be within the same timeframe as that for suit against the sub-contractor? Such rejection against his customer might be untenable in the light of the building of lasting business relationships. Or would he have to raise a suit himself, either against the sub-contractor or at least against his cargo claimant for a declaration of limited or non-liability in a forum where he can join the sub-contractor to ensure to be indemnified? Where he has subcontracted and the damage happened several carriers down the line, it will be more difficult for him to obtain the necessary evidence and he may be, at least partly, dependant in this respect on the cargo claimant and the actual carrier at the time of the damage; the latter of which he may not be in any contractual relationship with. There are therefore voices in case-law and literature approving of application of the time bar provision of article 39.4 by analogy also to carriers who are not true successive carriers, thus even outside the framework of chapter VI.⁸⁵

In *Ulster-Swift v. Taunton*,⁸⁶ for example, the Court of Appeal remarked obiter that it was not convinced by the setting of article 39.4 in the chapter on successive carriers that the provision could only apply as between successive carriers as per the convention, but thought instead that it applied to any claims between carriers.⁸⁷

However, in opposition to the above view stand the wording, warning function and content of the Chapter VI rules as set out above.⁸⁸ In this vein, it was also further argued that the extension of liability in chapter VI as *lex specialis* should be interpreted narrowly; being such an unusual and extraordinary rule, it should not be extended outside its framework.⁸⁹ Indeed the chapter VI framework was potentially founding liability for loss or damage which may have developed outside the custody of the particular carrier; and this result had its justification only in the situation of true successive carriership. Therefore it is submitted that the better reasons support the approach not to extend the application of chapter VI elements by analogy to any form of sub-contracting, but to only apply them to true successive carriership as per article 34. The sub-contracting carriers have the opportunity to secure their position by appropriate contract clauses and should do so providing certainty to their exposure

⁸² The incentive for the sub-contracting carrier to start proceedings for carriage charges may be rather minimal when the potential counter-claim for damages is enormous compared to the freight charge at stake, unless he is certain to be able to refer the primary carrier to another one down the line.

⁸³ CMR, Art. 31.2(c). See also Krijn Fake Haak, *The liability of the carrier under the CMR*, (Stichting Vervoeradres, The Hague, 1986) p 295 and 299. And once time barred the payment claim could no longer be used by way of counterclaim or set-off (art 32.4); see Clarke para 44b(ii).

⁸⁴ Since a written claim suspends the period of limitation until the claim is rejected by the carrier (art 32.2).

⁸⁵ Clarke, para 44b(i) with further references to French, German and Austria decisions; in favour also Staub HGB, CMR, art 34, paras 23 ff and Art 39, paras 2 and 12 (Helm) with further references and also to Austrian case-law. **Contrast** MüKo HGB, CMR, art 37, para 2 - 3 and art 39 para 9 (Jesser-Huß); Thume, art 39, para 2 (Schmid) and Koller, CMR, art. 39, para 5.

⁸⁶ [1977] 1 Lloyd's Rep. 346 (CA) at 360.

⁸⁷ The court in *Ulster-Swift* interpreted the term carrier in article 39.4 in the context of the convention as a whole and as per the wide wording in the implementing Act, section 14(2)(c) of the Carriage of Goods by Road Act 1965, listing as persons concerned in the carriage of goods as per the convention "any carrier who, in accordance with article 34 in the Schedule to this Act or otherwise, is a party to the contract of carriage". The result was that it found that article 39.4 was applicable between carriers, whether they were true successive carriers or not. However, this view was proffered in addition to the finding that there had been a successive carrier relationship in any event (see [1977] 1 Lloyd's Rep. 346 (CA) at 357 – 360).

⁸⁸ See above at 2.

⁸⁹ Thume, art 39, para 2 (Schmid).

and recourse rights, which is furthermore justified by their mark up on the freight compared to the freight payable to the performing carrier.

In the multimodal context

In comparison, in a scenario of several carriers carrying under different legs of a multimodal contract, no successive carrier rules exist for such multimodal movements and the time bars of each transport mode and its mandatory system would be applied for recourse action by the primary carrier against the various sub-carriers. The primary carrier must therefore act swiftly if he wants to ensure to obtain recourse from a sub-carrier. Should this be different simply because carriage takes place within one mode only? This hardly seems correct. Since sub-contracting seems more and more the way of effecting carriage under some modes, such as road carriage, one may possibly have to see the added exposure to claims and the possibility of not being able to recover as part of the cost of sub-contracting; after all the primary carrier will usually charge his customer a higher price for the services than he pays himself.

However, in the field of multimodal transport or within the sphere of other transport conventions, there may be more room for contractual arrangements between the carriers with respect to recourse and time for suit, whereas the CMR is very strict. The CMR forbids the parties to contract out of or amend its provisions and even between successive carriers inter se there is little room for differing contractual arrangements, with no scope for any alteration of time bars.⁹⁰ Additionally, many of the multimodal forms or freight forwarder's standard conditions provide for a 9 months' time bar⁹¹ allowing the principal contractor a leeway of at last 3 months for recourse actions as long as the cargo claimant cannot insist on the longer time bar under a mandatorily applicable transport convention.⁹² However, these differences cannot change the categorisation of a sub-contract as a different species to successive carriage.

c) What do other transport conventions provide? Do they know successive carriage as in the CMR and what can be learned from them?

How do international transport conventions generally approach this matter? Rules on successive carriage are in no way the norm. Sea⁹³ and inland waterway⁹⁴ conventions do not contain this concept

⁹⁰ See CMR, arts 41 and 40; the latter only referring to arts 37 and 38 on the share of liability to be borne by the individual successive carriers. Contrast CIM, art 5 in fine; HVR, art III (6bis), III (8) and Rotterdam Rules, art 79.1 permitting an increase in liability and obligations of the carrier and Montreal Convention, art 48, clarifying that rights and obligations between carriers inter se are generally not affected.

⁹¹ See BIMCO's (The Baltic and International Maritime Council) COMBICON (Combined Transport Bill of Lading), revision 1995, cl 4, BIMCO's MULTIDOC (Multimodal Transport Bill of Lading), revision 1995, cl 4; FIATA's (International Federation of Freight Forwarders Associations) multimodal transport bill of lading form, cl 17; FIATA Model Rules for Freight Forwarding Services 2007, cl 10; UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication No. 481), cl 10; BIFA STC (British International Freight Association Standard Trading Conditions), 2005A, cl 27 (B). *contrast* the one year time bar of NSAB (Nordic Association of Freight Forwarders) 2000 General Conditions, § 30.

⁹² Where damage is localised and the forum treats the relevant transport convention as mandatorily applicable, irrespective of the multimodal nature of the contract; see for example the English case of *Quantum Corporation Inc v Plane Trucking* [2002] EWCA Civ 350, [2002] 1 WLR 2678 for a mandatory application of the CMR to the international road leg of a multimodal contract under an air waybill.

⁹³ See The International Convention for the Unification of certain Rules relating to Bills of Lading of 1924 (Hague Rules) as amended by the 1968 Brussels Protocol (Visby Protocol) (Hague-Visby Rules - HVR); the United Nations Convention on the Carriage of Goods by Sea (Hamburg) 1978 (Hamburg Rules - HambR); the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam) 2008 (Rotterdam Rules - RR).

⁹⁴ The Convention on the Contract for the Carriage of Goods by Inland Waterway (Budapest) 2001 (CMNI).

at all. And in the road,⁹⁵ rail⁹⁶ and air⁹⁷ conventions which include rules on successive carriage there is no uniformity and their provisions and concepts differ. They mostly provide rules on which carrier can be sued by cargo interest⁹⁸ and CMR and CIM further give guidance on recourse actions.⁹⁹

While the CMR rules are the most involving for successive carriers, allowing several successive carriers to be sued at the same time by cargo interests¹⁰⁰, this is not the case under CIM, which requires that one carrier is selected with the effect of extinguishing any claims against the others.¹⁰¹ The joinder of recourse actions with the proceedings for compensation is prohibited under CIM,¹⁰² whereas no stipulation to this effect can be found in the CMR. English courts have therefore allowed joinder of other carriers to the initial cargo proceedings insofar as allowed by its procedural rules,¹⁰³ albeit only when the CMR jurisdictional rules were fulfilled.¹⁰⁴ Under CIM, recovery proceedings must be made against all successive carriers or otherwise the recovery claim against any carrier not so joined is lost.¹⁰⁵ CIM thus, compared to the CMR, explicitly aims at keeping exposure of successive carriers to law suits and related costs to a minimum, but enables cargo claimants to sue the first, the last or the performing carrier, as in the CMR.¹⁰⁶ Notably however, CIM does not contain rules on time bars for recourse actions and thus leaves this matter to domestic law.

What is new in its 1999 revision of CIM is that, in addition to the successive carrier provisions, the concept of substitute carriers was added.¹⁰⁷ This seems to be in recognition that without the track monopoly, differences in contracting can arise and not all carriers who are involved in the carriage are acting as successive carriers. Inspired by air and maritime transport and in particular by Article 10 of the Hamburg Rules, the interest of cargo claimants are catered for by making the substitute carrier, despite not being in a contractual relationship with cargo, nevertheless answerable to cargo claimants. The contractual carrier and the substitute carrier are joint and severally liable to cargo interests; but

⁹⁵ The CMR.

⁹⁶ COTIF-CIM 1999.

⁹⁷ See The Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw) 1929 (WC), The Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules to International Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara) 1961 and The Convention for the Unification of Certain Rules for International Carriage by Air (Montreal) 1999 ((MC).

⁹⁸ See the land and air conventions, CMR arts 34 – 40, CIM arts 26, 45, 50-52, WS art 30, and MC art 36.

⁹⁹ Not much can be found in the air convention.

¹⁰⁰ CMR, art. 36 in fine.

¹⁰¹ See CIM 1999, art 45.7 and Explanatory Report to CIM 1999, art 45, para 1 (the reason given is that carriers by rail did not have the same problems of solvency as road carriers had, so that plurality of suit was not necessary); CIM 1980, art 55.4 and MüKo HGB, CIM, art. 45, para.2.

¹⁰² CIM 1999, art.51.6 and CIM 1980, art.62.5.

¹⁰³ See *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* [1981] 1 W.L.R. 1363 (CA), 1372; [1981] 2 Lloyd's Rep. 402 (CA) at 407 and *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v Birkart Johann Internationale Spedition GmbH & Co KG* [1988] 1 Lloyd's Rep. 487 (CA) at 494. Although article 37 required as a pre-condition for a recovery claim that the claiming carrier had himself paid the sender or consignee, and seemed to work on the premise that a cargo claim was decided first and then followed by a recovery claim between carriers, the court in *ITT Schaub* did not see this as an issue. Local procedural rules would only be overridden or ousted where they were inconsistent with or repugnant to the CMR rules or the implementing Act. This was not the case with third party proceedings for declaration of liability to indemnify the defendant carrier or even with claims for indemnity against any sums properly paid to the plaintiffs. Bingham LJ, as he then was, agreed with the remarks of Brandon J in *Cummins* (at 407) that while the CMR seemed to contemplate consecutive proceedings, where the procedure of the court in which the main action was to be held allowed contribution or indemnity actions to be added to the main action there was no good reason in principle why what was contemplated by the CMR as second and consequential action should not be brought by way of such third party proceedings. Instead Bingham LJ opined that third party proceedings would be "useful and desirable for all the familiar reasons".

¹⁰⁴ On the content and extent of jurisdiction under the CMR and, in particular, articles 31.1 and 39.2 CMR, see *BAT v Exel* [2015] UKSC 65; [2016] A.C. 262; [2016] 1 Lloyd's Rep. 463.

¹⁰⁵ CIM 1999, art. 51.2 and CIM 1980, art. 62.2.

¹⁰⁶ CIM 1999, art.45.1 and CIM 1980, art.55.3.

¹⁰⁷ See CIM 1999, art 27 and Explanatory Report to CIM 1999, art.27, para 1 and to art.26 para 2.

the substitute carrier is responsible only for his part of the transportation,¹⁰⁸ whereas the contracting carrier remains liable for the full contractual carriage.

Air carriage conventions also have rules for so-called “successive carriers” envisaging their joint and several liability,¹⁰⁹ but these are much more limited in scope: While each of the carriers who accepts passengers, luggage or goods is subjected to convention rules and is deemed to be a party to the contract, this is only to the extent that the contract is performed under his supervision.¹¹⁰ Liability is therefore only incurred by a successive carrier for his part of the carriage. Similar rules are provided for the involvement of actual carriers.¹¹¹ The air conventions however do not contain any provisions on recourse but simply highlight that recourse actions are not affected by the conventions,¹¹² and thus left to domestic law.¹¹³

This is much more akin to the sea and inland waterway conventions which, if any,¹¹⁴ only have rules concerning the involvement of actual carriers alongside the contractual carrier. They provide the cargo claimant with a right of action against the actual carrier and the contractual carrier,¹¹⁵ explicitly stipulating their joint and several liability.¹¹⁶ However they mostly leave rights of recourse between the carriers unregulated,¹¹⁷ although they give a minimum timeframe for limitation of recourse actions.¹¹⁸

What can be seen is that conventions which have been created or amended after the coming into force of the CMR in 1956 recognise different approaches to the effecting of transportation via different performance models and in particular via conception of the actual or performing carriers, who may be substituting the performance of the contractual carrier in part or in full. The norm in these transport conventions is to give a direct right of action to the cargo claimant, yet to leave the details of the interaction and rights of recourse between the carriers unregulated with only stipulating a short additional timeframe for suit for recourse claims, which only comes into play if not already provided for by domestic law. It is submitted that if the CMR were to be reformed a similar approach should be taken. If this was done, the successive carrier rules could be deleted altogether. If this was seen too radical the successive carrier rules should alternatively be clarified to apply only in very strict circumstances of true successive carriership according to the letter and based on a narrow interpretation of the CMR rules. The same narrow interpretation should be applied in the absence of reform to safeguard the value judgments of the CMR and the interests of the, most likely, weakest in the chain, the performing carrier.

¹⁰⁸ CIM 1999, art. 27.

¹⁰⁹ WS art 30.3 and MC art 36.3. Although contrast CIM art 45.7, where the claimant may initially have a choice between several carriers, but can only sue one of them and by making the choice loses the right of action against all others.

¹¹⁰ WS art 30.1 and MC art 36.1.

¹¹¹ See Guadalajara Convention and MC, chap. V (arts 39 – 48).

¹¹² See Guadalajara Convention art X, MC arts 37 and 48.

¹¹³ See David McClean, *Shawcross and Beaumont, Air Law*, (LexisNexis Butterworths: loose-leaf with updates), Issue 142, September 2014, at paragraph 446.1, *Chubb Insurance Company of Europe SA v Menlo Worldwide Forwarding Inc*, 32 Avi 15, 978 (CD Cal, 2008) and *South West SHA v Bay Island Voyages* [2015] EWCA Civ 708; [2016] Q.B. 503; [2015] 2 Lloyd's Rep. 652 at para.20.

¹¹⁴ The Hague and Hague-Visby Rules do not contain any of these provisions.

¹¹⁵ See the air conventions the Warsaw regime via the Guadalajara Convention, MC arts 39 – 45, the sea and inland waterway conventions, HambR art 10, RR arts 19 and 20, CMNI art 4. And similarly see the rail convention in its provision for a substitute carrier, CIM 1999, art 27.

¹¹⁶ See the sea and inland waterway conventions, HambR art 10.4, RR art 20, CMNI art 4; and see also CIM art 27.4 for the relationship carrier and substitute carrier.

¹¹⁷ See as an exemption from this rules the CMNI with its article 4.1, providing that the convention liability rules also apply between contracting and actual carrier.

¹¹⁸ See the sea and inland waterway conventions, HVR art III r6 bis, HambR art 20.4, RR art 64, CMNI art 24.4

6. Conclusion

The Concept of the Successive Carrier is outdated. The system of successive carriers is dependent on all its provisions working together to be appropriate and desirable: narrow and strictly limited. This concept no longer fits in with the modern realities of road transport but rather undermines the value judgments made in the CMR and the purpose of its strict application.

Other transport modes, apart from rail carriage, do not apply a similar regime. In effect, this regime nowadays facilitates abuse of the actual carrier, who often, after a long line of sub-contracts, may carry the goods with full exposure to liability for freight substantially lower than that charged to the customer by the primary or contracting carrier. It is therefore submitted that the concept should be abolished and replaced by the actual carrier concept found in air and sea conventions allowing cargo interests to sue the actual carrier and giving a short additional limitation period for recourse claims between carriers. In the absence of any amendment to the CMR, courts should apply a narrow interpretation of the successive carrier concept.

While back-to-back liability and straight forward recourse is the ideal for freight forwarders and the merely contracting but not performing carriers, the CMR was written with the interest of both, cargo interests and the actual or performing carrier in mind. To be able to conduct swift and effective business and to limit his exposure, the (actual) carrier should be able to close his books after the time bar period had elapsed. The wide and varying interpretation of the successive carrier regime beyond its initial remit, leads to uncertainty and to increased exposure of the weakest in the chain, the actual carrier. It also has the undesirable potential to clutter the court system with preventative claims by carriers against as many other “carriers” and sub-contractors as can be identified and thus might lead to a significant increase of litigation and other friction costs.